UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	MASTER FILE 02 Civ. 3288 (DLC)
This Document Relates to:	
ALL ACTIONS	OPINION & ORDER

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DENISE COTE, District Judge:

On October 29, 2003, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), wrote on behalf of its co-lead counsel Barrack, Rodos & Bacine and lead plaintiff New York State Common Retirement Fund ("Lead Plaintiff" or the "NYSCRF") to inform the Court of evidence which it had recently obtained that, it argued, provided a basis to believe that Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss") was soliciting absent class members with misleading statements about this Securities Litigation. In particular, Lead Plaintiff contended that Milberg Weiss was giving those absent class members the false impression that the only way that pension funds with losses from their purchases of WorldCom bonds could recover damages was to retain Milberg Weiss and file an individual action, and that they must do so expeditiously or lose any opportunity to recover their losses.

Milberg Weiss responded on November 3, by contending that Lead Plaintiff had failed to show that Milberg Weiss had made any public or mass mailings soliciting legal representation, and that Milberg Weiss had never publicly distributed solicitation materials relating to the WorldCom litigation. It asserted that

no potential client has received any written proposal for legal representation unless the client had previously requested it. Milberg Weiss described the letters at issue as either private communications with clients, or private communications made by clients, not by attorneys. These private communications, Milberg Weiss avers, were not misleading and reflect their opinions of the litigation which they are free to share with clients or potential clients. Milberg Weiss also contends that even if the private communications made not by Milberg Weiss, but by its clients, were misleading, those communications may be protected speech.

Lead Counsel replied on November 4, and with the approval of the Court, Milberg Weiss submitted a sur-reply on November 7. A hearing was held on November 13.

In its November 4 submission, Lead Counsel requests that the Court: (1) order Milberg Weiss to produce listed information related to Milberg Weiss's solicitation efforts, including communications and the names of class members contacted, which would likely form the basis for Lead Plaintiff to propose a curative notice; (2) order Milberg Weiss not to disseminate materials to members of the certified class without first obtaining the consent of Lead Counsel or the Court; and (3) order Milberg Weiss not to initiate oral discussions with any member of the certified class who has not already retained Milberg Weiss.

Background

The following provides some necessary background to this dispute between Lead Plaintiff for the Consolidated Class Action,

and Milberg Weiss, counsel for numerous individual actions. On June 25, 2002, WorldCom announced that it had improperly treated more than $3.8 billion in ordinary costs as capital expenditures and would have to restate its publicly-reported financial results for 2001 and the first quarter of 2002. WorldCom has since admitted that its publicly-reported financial results for 1999 through the first quarter of 2002 were overstated by approximately $9 billion.

Beginning on April 30, 2002, class action securities fraud complaints were filed in this Court in response to revelations about accounting irregularities at WorldCom, Inc. ("WorldCom"). As the deadline to move for lead plaintiff status in the WorldCom class action litigation was approaching, Melvyn Weiss of Milberg Weiss had discussions with the NYSCRF about representing it as the lead plaintiff in the WorldCom class action. Milberg Weiss's New York office had prepared a class action complaint for the NYSCRF. William Lerach of Milberg Weiss informed Mr. Weiss that he was engaged in discussions with several large institutional investors about representing them in individual bond purchase suits, and had made a commitment to some of those institutions to do so. As a consequence, Mr. Weiss informed the NYSCRF that his law firm would not represent it in this class litigation. The NYSCRF had purchased WorldCom stock, but not the bonds that are at issue in this litigation.

On August 15, 2002, this Court consolidated the class actions and appointed NYSCRF lead plaintiff. Lead Counsel and its co-lead counsel were approved as class counsel. Meanwhile,

beginning on July 5, 2002, Milberg Weiss began filing individual actions ("Individual Actions") on behalf of pension funds in state courts across the country, pleading solely federal securities law claims under the Securities Act of 1933, specifically claims arising under Sections 11 and 12(a)(2) of the Securities Act. Other plaintiffs not represented by Milberg Weiss also filed individual actions, here and elsewhere, alleging Securities Act and Exchange Act claims.

One of the other individual actions, an action brought by New York City Employees' Retirement System and eight other New York City pension funds, moved for remand of its action to the state court in which it was filed. Milberg Weiss sought and received permission to intervene in support of the motion to remand on behalf of some forty-one of its pension fund clients. By Opinion dated March 3, 2003, this Court found that state and federal courts have concurrent jurisdiction over actions pleading solely Securities Act claims and that actions pleading solely Securities Act claims would not be removable to federal court on the basis of federal question jurisdiction. In re WorldCom, Inc. Sec. Litig., 293 B.R. 308, 328 (S.D.N.Y. 2003). The Court held, however, that such actions were subject to federal jurisdiction as "related to" the WorldCom bankruptcy and were properly removed on that basis to federal court. Id. at 328-29.

As of October 3, 2003, Milberg Weiss has filed at least forty-seven Individual Actions on behalf of over one hundred and twenty pension funds, many of them public employee or union pension funds. The defendants have removed these actions to

federal court on the ground that they are related to WorldCom's bankruptcy, and the Panel on Multi-District Litigation ("MDL Panel") has transferred many of these actions to this Court. Over the objection of Milberg Weiss, the Individual Actions have been consolidated with the class action for pretrial purposes.

The Four Letters

Four letters evidencing what Lead Counsel contends are Milberg Weiss's solicitation efforts have been presented by Lead Counsel, the most recent with a cover letter of November 11. The following describes the contents of the letters and the factual context for those letters as described by Milberg Weiss, unless otherwise noted.

July 2002 Renne & Holtzman Letter

In July of 2002, Louise Renne ("Renne"), an attorney with the firm of Renne & Holtzmann Public Law Group ("Renne & Holtzmann"), and others from that firm, communicated with City and County Counsel concerning the potential representation of California municipalities in the WorldCom litigation. In the summer of 2002, Renne wrote to Counsel for various California counties to invite them to two meetings that Renne & Holtzmann had arranged to discuss a coordinated effort to pursue recovery in connection with the WorldCom fraud.

A July 22, 2002 letter to County Counsel for the County of Fresno ("Fresno"), is typical of the letters sent by Renne & Holtzmann in the summer of 2002. The letter advises Fresno that Milberg Weiss, with whom Renne & Holtzmann says it is affiliated, had uncovered illegalities leading to government losses from the

two WorldCom bond offerings of May 2000 and May 2001. At the time the letter was sent, Milberg Weiss already represented Fresno in connection with a settlement obtained in California tobacco litigation.

The July 22 letter urged the recipient to attend a July 29 meeting to discuss a strategy for recovery of the WorldCom losses. It explained that the intent was to unite local governments throughout California in a single action that would not be a class action. It underscored that there was strength in numbers.

An attorney from Fresno County Counsel's office requested more information concerning the WorldCom bond litigation strategy. Milberg Weiss represents that a second letter containing a proposal was sent to Fresno, but it has not provided a copy of that letter. Fresno later informed Renne & Holtzmann that the County was not interested in working with the coalition that Renne was assembling.

May 2003 Lerach Letter

In late February or early March 2003, outside counsel for the Asbestos Workers Local 12 Annuity Fund (the "Asbestos Fund") requested information from Milberg Weiss concerning its representation of Taft-Hartley pension funds in actions against WorldCom bond underwriters. On May 23, 2003, Milberg Weiss submitted a written proposal to the Asbestos Fund for what it described as the WorldCom bond litigation. The letter noted that a class action had been filed on behalf of all purchasers of WorldCom stock and debt securities, and that all class and

private actions had been transferred to the Southern District of New York for pre-trial proceedings. It emphasized that the Lead Plaintiff in the class action purchased no WorldCom bonds. It noted that the defendant banks were moving to dismiss the bond claims from the Lead Plaintiff's class action complaint because it had not purchased bonds.

The Milberg Weiss letter did not mention that three other named plaintiffs had been added to the consolidated class action complaint filed over seven months earlier, on October 11, 2002, specifically to provide additional representation for bondholders. The May 23 letter did not mention that just days before, on May 19, the Court had largely denied the motions to dismiss the class action complaint. See In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 21219049, at *35 (S.D.N.Y. May 19, 2003). The May 19 Opinion denied all motions to dismiss the Securities Act claims based on the May 2000 and May 2001 bond offerings and rejected the defendants' attacks on the addition of the three bond purchaser plaintiffs. The May 19 Opinion found that the class action complaint had adequately alleged that the named plaintiffs had standing to assert the Securities Act claims arising from the two massive WorldCom bond offerings. See id. at *27-28.

The Milberg Weiss letter described four bond offerings for which it was bringing Sections 11 and 12 claims on behalf of bondholders: the August 1998, May 2000, December 2000, May 2001 bond offerings. The letter notes that the December 2000 bond offering involved non-registered securities that were privately

placed to institutional investors and, although it explains that the investor must have purchased in the original offering to have a 12(a)(2) claim, it does not discuss the legal impediments to bringing a Section 12(a)(2) claim for a private placement, and does not explain clearly that there is no Section 11 claim for the December 2000 offering. The letter notes that it has not yet been established if the registration statement for the August 1998 bond offering contained misrepresentations, but does not mention the potential statute of limitations impediment to this claim.

The letter continues to describe how Milberg Weiss will file individual actions for the funds, but will conduct them in a "coordinated cooperative manner so as to share the benefits of our investigatory efforts, discovery and other information, as well as experts, thus achieving economies of scale." The May 23 letter argues that the advantages of coordinated litigation activity against common defendants would also include the leverage derived from the value of the aggregated claims. It represents that pursuing an Individual Action permits the individual fund to retain control of its own claims and to be in a position to settle or try its claims as it chooses. Milberg Weiss's goal, as described in its letter, was to assemble a coalition of public and private pension funds with $2 to $3 billion in losses and to pursue coordinated litigation throughout the United States apart from whatever happens in the class action. It offered its services on a contingent fee basis with a base fee of either 12 or 13%, plus expenses, and a cap of 17%.

The May 23 letter notes that the damage claims for stock losses will greatly exceed the damage claims for the bond losses from the four bond offerings and that, as a result, "any recovery in the class action will almost certainly favor the common stockholders and disfavor the bondholders." (Emphasis in original.) To emphasize the point, it asserts that it "can foresee no circumstances" under which the fund's "passive reliance on the class action case would not result in a severe dilution of the recovery to which purchasers of the bonds are entitled." (Emphasis in original.) The letter concludes that there "is no reason to dilute the value of [the bondholders'] claims by passively relying on the securities class action on behalf of all purchasers of all WorldCom securities in federal court in New York. Pursuing that strategy can only result in dilution of the recovery to which these uniquely situated purchasers of the bonds ... are entitled under the 1933 Act." (Emphasis in original).

The letter identifies the underwriters as the defendants with the deepest pockets, and therefore, the defendants from whom it expects to obtain its recovery. The letter does not explain that, with one exception, all of the underwriter defendants in the consolidated class action complaint are named only in the Securities Act claims brought in connection with the two massive bond offerings of May 2000 and May 2001, and therefore, the likelihood is that any recovery from those defendants in the class action will inure only to the benefit of the class members who are bondholders. One of the lead underwriters for the two

bond offerings -- Salomon Smith Barney -- is named not only in the Securities Act claims, but also in the Exchange Act securities fraud claims in the class action complaint. Potentially, therefore, any recovery from Salomon may be available to both bondholders and shareholders.[1]

After receiving the May 23 letter, counsel for the Asbestos Fund requested that Milberg Weiss prepare a report and recommendation for its Board of Trustees. On July 23, 2003, the Board unanimously voted to retain Milberg Weiss and to proceed with filing an Individual Action against the WorldCom bond underwriters.

June 2003 Lerach Letter

A second letter from William Lerach, this one dated June 24, 2003, was provided to the Chairman of the Anchorage Police and Fire Retirement System. The substance of the letter is identical to the May 2003 Lerach letter, including the sections previously quoted. Of note, this letter also contains the statement that "the defendant banks are moving to dismiss the bond claims from the lead plaintiff's class action complaint," although the motion to dismiss the bond claims had been denied on May 19, over a month before.

[1] It would appear that Milberg Weiss has chosen a strategy to file as many cases as possible for its pension fund clients in different states and to resist removal of those cases to federal court and their subsequent transfer to a single federal court by the MDL Panel. It has eschewed the filing of Exchange Act claims even if such claims would increase a plaintiff's leverage, since the presence of Exchange Act claims would provide an independent basis for removal of the cases to federal court.

The Chairman's November 10 affidavit explains that in early July 2003, he received a phone call from a lobbyist in Alaska who asked him to go to lunch to discuss securities litigation and Milberg Weiss. The Chairman responded that he was already represented in securities litigation. At their lunch in late July, the lobbyist handed the June 2003 letter, as well as other materials concerning Milberg Weiss, to the Chairman.

October 2003 President's Letter

On August 4, 2003, William Lerach made a presentation in Chicago to a meeting of the Governing Board of Presidents of the Building and Construction Trades Department of the American Federation of Labor--Congress of Industrial Organizations ("AFL-CIO"). The purpose of the presentation was to provide information to the union presidents about how to protect the assets of the pension funds affiliated with their unions, and specifically about possible litigation strategies in the WorldCom securities litigation. Milberg Weiss represents that it informed the gathering of the existence of the class action during that meeting.

On October 3, 2003, the President of the Building and Construction Trades Department of the AFL-CIO wrote to its Governing Board of Presidents. The President urged each of the members of the board of presidents to contact Milberg Weiss and to file an Individual Action as soon as possible. The letter advised the presidents that individual actions were being filed by Milberg Weiss to recover for losses suffered by WorldCom bondholders. It advised: "**Please be aware that these actions**

that are being filed are NOT class actions. Thus, if the funds do not file their own individual actions, they will not share in the recoveries." (Emphasis in original.) It emphasized that "this is a time sensitive matter, as the funds that have already filed claims are currently in settlement discussions with the defendants....[I]t is important to file your claim as soon as possible to make sure that you have a seat at the settlement table." To date, Milberg Weiss has been retained, either generally or in the WorldCom litigation specifically, by affiliates of 13 of the 15 international unions that comprise the Building and Construction Trades Department of the AFL-CIO.

Although the October 3 letter refers to time pressure due to settlement negotiations, it does not mention that each of the union funds would be able to participate in any recovery won by the class action even if it had not filed an Individual Action. In its sur-reply submitted to the Court, Milberg Weiss notes that "prompt action" is also required since the statute of limitations may soon expire for claims based on the bonds issued in December 2000. The Court is unaware of any statute of limitations trigger date that falls between October and December 2003.

On October 24, 2003, this Court certified a class in the Securities Litigation.

Findings

Other than providing context for the four written communications submitted by Lead Counsel, Milberg Weiss has not presented other evidence about the substance of its statements to those it hoped would retain it and pursue Individual Actions.

Therefore, and based solely on the record as it now stands, there are several conclusions to draw from these facts.

1) It is appropriate to begin with some bedrock truths. Every investor who has suffered a loss has the right to seek recovery. Every investor has the right to bring an individual action if it chooses to do so. Every investor will have the right to opt out of the certified class action.

2) Milberg Weiss has engaged in an active campaign to encourage pension funds not to participate in the class action and instead to file Individual Actions with Milberg Weiss as their counsel.

3) At this stage, Milberg Weiss is running the coordinated Individual Actions much as a de facto class action.

4) Milberg Weiss has targeted a relatively sophisticated audience with important and serious fiduciary duties to its membership and beneficiaries. The private and public pension funds can be expected to have access to independent legal advice should they seek it, and to have attorneys on retainer or on their staffs who would be in a position to obtain alternative advice from that offered by Milberg Weiss should they desire it.

5) There is no reason to believe that the funds that have filed Individual Actions have done so with any but the best of intentions to obtain the maximum recovery for their constituency. And it is important to remember that constituency. After all, behind the lawyers and the pension fund officers stand the many individual state, local, public, and private employees whose lost retirement savings and benefits the funds seek to recover.

6) There may be sound and good reasons for filing an Individual Action and choosing to opt out of the class action. But, given the seriousness of the claims, and the gravity of the losses the defendants are alleged to have caused, every putative member of the class should have access to all of the relevant information about their legal options and the consequences of each choice. They are entitled to no less.

7) The communications with Milberg Weiss have resulted in some confusion and misunderstanding of the options available to putative class members. The deficiencies include the following:

a) From these submissions, Milberg Weiss does not appear to have presented a forthright description of the advantages and disadvantages of both the individual action and class action options.

b) It does not appear that the advantages and disadvantages of excluding Exchange Act claims from the Individual Action complaints have been adequately described.

c) The potential impediments to bringing claims based on the 1998 and December 2000 bonds are not fully described.

d) The potential statute of limitations impediments to bringing certain of the more recently filed Individual Actions do not appear to have been described. This could be a very serious problem for a litigant who chooses to opt out of the class, only to learn that the Individual Action it had filed was barred by the statute of limitations and it had lost all right to recovery. This very issue is now sub judice.

e) It is unclear whether those who have filed Individual Actions and who also had losses from investments in WorldCom stock have been adequately advised of the as yet undetermined risk that they may lose an opportunity to share in any recovery for their stock losses.

f) It does not appear that investors have been adequately advised that a fund does not need to file an Individual Action in order to obtain recovery for its losses. Without doing anything, each fund is a member of the class certified in this litigation, with the right to share in any recovery won on behalf of the class, free of the burden of pursuing its own separate action.

g) It does not appear that investors have been adequately advised that, within the class action, bondholders are represented by their own named representatives, and should there be any reason to believe that the allocation of any settlement between the bondholders and shareholders is not fair, then not only the named representatives of the bondholders, but also members of the class, will have an opportunity to object and to have their objections heard.

h) It does not appear that investors have been adequately advised that no distribution will be made to class members without the Court approving the fairness of the distribution.

i) It does not appear that investors have been adequately advised that before there is any award of attorneys' fees to Class counsel, there will be an opportunity for objections to be heard and a careful review by the Court.

Legal Standard

Rule 23(d) of the Federal Rules of Civil Procedure provides that the court may make appropriate orders:

> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . ;
> (3) imposing conditions on the representative parties . . . ; and
> (5) dealing with similar procedural matters.

Interpreting this Rule, the Supreme Court has held that, "because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Company v. Bernard, 452 U.S. 89, 100 (1981).

The Gulf Oil Court specified that any order that limited communications between parties and potential class members "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Id. at 101. A court making this assessment should look to further the policies embodied in Rule 23, while limiting speech as little as possible, consistent with the rights of the parties under the circumstances. Id. at 102; Rossini v. Ogilvy & Mather, 798 F.2d 590, 601-602 (2d Cir. 1986). One of the policies of Rule 23 that has been specifically identified by the Second Circuit is the protection of class members from "misleading communications from the parties or their counsel." Erhardt v. Prudential Group, 629 F.2d 843, 846 (2d Cir. 1980); see also In re School Asbestos

Litigation, 842 F.2d 671, 680 (3d Cir. 1988) ("Misleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally.")

Solicitations for legal services that are motivated by economic considerations constitute commercial speech. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988); Anderson v. Treadwell, 294 F.3d 453, 460 (2d Cir. 2002) (discussing standards of commercial speech). The First Amendment does not protect misleading commercial speech, which may be prohibited by the government if it is more likely to deceive the public than to inform it. Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563-564 (1980); Anderson, 294 F.3d at 461. Misleading communications by lawyers are not only constitutionally unprotected, but are prohibited by New York's Code of Professional Responsibility, which provides that "a lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading." 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6 (2003).

Conclusion

There is no dispute among any of the parties in the Securities Litigation regarding several important facts. All investors are entitled to receive accurate information regarding

their legal options. Now that a class has been certified, this Court has a particular obligation to monitor communications with the class and to ensure that the notice they receive in the class action is accurate so that they are in a position to make an informed decision as to whether to opt out of the class. Having considered the factual record now before the Court, the parties' submissions, and the law that governs these issues, it is hereby ORDERED:

1) The motion by Milberg Weiss to strike the exhibits to the Bernstein Litowitz October 29 letter brief is denied. Milberg Weiss does not contest the authenticity of the communications.

2) The requests for relief in the Lead Counsel's submission of November 4 are denied. Should Lead Counsel wish to pursue those requests, it should bring a motion for that relief accompanied by a formal notice of motion.

3) In addition to the Notice which shall be provided to all members of the class, a separate Notice will also be sent to each plaintiff who has filed an individual action. Lead Counsel shall draft the Notice, and all parties to this Securities Litigation will have an opportunity to provide comments and suggested revisions. This includes the defendants' and all plaintiffs' counsel in individual actions.

SO ORDERED:

Dated: New York, New York
November 17, 2003

DENISE COTE
United States District Judge